IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 23 OF 2002.

1. Smt. Amelia Violeta de
   Souza alias Amelia Lobo
   e Souza,
2. Shri Candido Francisco
   Leopoler de Souza,
   both r/at Calangute,
   through their constituted
   Attorney Shri Anthony
   C.J.T. Saldanha (since deceased
   by his legal heirs:
   a) Jason D'Souza,
   b) Smt. Meline D'Souza,
      through their Attorney
      Shri Joseph Alcantra
      Lobo, Parra, Goa. ... Appellants.

Versus

Shri Suresh Govind Kamat Tarkar,
r/at Calangute. ... Respondent.

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar, Advocate for the Appellants.

Mr. U.S. Kolwalkar, Advocate for the Respondent.

Coram: P.V. HARDAS, J.

Date: 5th December 2002.

ORAL ORDER.

Two Courts below have concurrently held against the defendants and the defendants have, therefore, filed the present Second Appeal. The respondent/original plaintiff had filed Special Civil Suit No. 385/81/A/II, in the Court of IInd Additional Civil Judge, Senior Division at Mapusa, against the present appellants. The said suit was for specific performance of contract. The learned trial Court, by its Judgment and Decree, dated 29th April 1999, decreed

the suit filed by the plaintiff. The defendants, being aggrieved by the aforesaid Judgment and Decree, filed an appeal before the District Judge, North Goa, Panaji, namely, Regular Civil Appeal No. 101/99 and the learned lower appellate Court, by its Judgment and Decree, dated 12th October 2001, dismissed the appeal filed by the defendants. This Second Appeal is, therefore, filed by the original defendants assailing the Judgment and Decree of the two Courts below.

2. Records and Proceedings of the two Courts below have been called. I have perused the Judgments of the two Courts below.

3. The learned trial Court had recorded a finding that deceased Reginaldo had entered into an agreement, on 2nd April 1978, Exhibit P.W.1/A, with the plaintiff for sale of the suit property surveyed under Survey No. 120/3, for Rs. 65,000/- and that the plaintiff had paid Rs. 36,831/- and Rs. 14,820/- to the said Reginaldo. The learned trial Court had also recorded a finding that the defendants, who had set up a plea that the signature on the Agreement of Sale was not of Reginaldo and was forged by the plaintiff, could not prove that the signature of Reginaldo on the Agreement, dated 2nd April 1978, was forged. The learned trial Court, therefore, decreed the suit and

directed the defendants to execute the Sale Deed of the suit property in favour of the plaintiff against payment of Rs. 23,169/-, which was the balance amount.

4. The learned lower appellate Court framed four points for consideration which are: (1) whether the plaintiff had proved that late Reginaldo D'Souza had entered into an Agreement, dated 2nd April 1978, with the plaintiff to sell the suit property? (2) whether the plaintiff had proved that he had paid Rs. 36,831/- and Rs. 14,820/- to late Reginaldo? (3) whether the plaintiff was entitled for specific performance of the Agreement? and (4) whether the defendants had proved that the signature of Reginaldo on the aforesaid Agreement was forged by the plaintiff? The learned lower appellate Court in respect of the first three points, answered in affirmative and in respect of the fourth point, answered in the negative.

5. The learned lower appellate Court repelled the contention on behalf of the appellants that the Agreement, at Exhibit P.W.1/A, was not an original copy but a copy of the original. The learned lower appellate Court made a reference to the evidence of P.W.1, wherein the plaintiff had stated that the original Agreement was with the landlord and, hence, he was producing a copy of the same. The said copy, which

was produced in the Court, bore the signatures of deceased Reginaldo as well as of the attesting witnesses and of the plaintiff. The learned lower appellate Court made a pointed reference that in the cross-examination the assertion of P.W.1 that the original was with the landlord was not denied. In fact, in the cross-examination, it was suggested to P.W.1 that, on account of heavy drinking, late Reginaldo was not in a state of mind to execute the Agreement and the Agreement does not bear the signature of Reginaldo. The plaintiff in order to prove the Agreement at Exhibit P.W.1/A had examined the attesting witness named Jagdish Kakodkar as P.W.2. In respect of P.W.2 Jagdish Kakodkar, the learned lower appellate Court has observed, after appreciating the evidence, that P.W.2 was not at all shaken in the cross-examination. Incidentally, it may be mentioned that the appellants/original defendants did not examine any handwriting expert to establish before the Court that the signature of Reginaldo on the Agreement was a forged signature. In fact, an issue in that regard was framed by the learned trial Court, which reads as under:-

> "Whether the signatures of said Reginaldo on the Agreement dated 2-4-78 are forged?

On the basis of the evidence, which was tendered by the

parties, the learned trial Court answered the said issue in the negative.

6. In this behalf a grievance was made before the learned lower appellate Court that the defendants had moved an application for sending the document for being examined by a handwriting expert. The learned trial Court had rejected the said application which was filed after the parties had closed their evidence and the suit was fixed for final arguments. The original defendants chose not to challenge the said Order by way of revision but a grievance was made before the learned lower appellate Court. The learned lower appellate Court held that, looking to the time which was at the disposal of the original defendants to take appropriate steps, the said application was hit by laches and inordinate delay. The suit had been filed in the year 1981 and the said application for sending the document to the handwriting expert was filed on 30th December 1998. The learned lower appellate Court, therefore, concurred with the view of the learned trial Court and repelled the submission. The learned lower appellate Court on the plea of the present appellants had compared the signatures of deceased Reginaldo on the Agreement Exhibit P.W.1/A and the Deed of Mortgage at Exhibit P.W.1/B and on comparison, by naked eye, found that the signatures at Exhibits P.W.1/A and P.W.1/B

were of the same person.

7. I have heard Mr. Coelho Pereira, the learned senior counsel appearing on behalf of the appellants, who has urged before me that there was no readiness and willingness on the part of the present respondent to perform his part of the contract and, therefore, he was not entitled for a decree of specific performance. According to the learned senior counsel, there was delay, which amply demonstrated that the respondent was not ready and willing to comply with his part of the contract and, therefore, the learned Courts below ought not to have granted specific performance of the Agreement. It is next urged by the learned senior counsel appearing for the appellants that the suit, which was filed by the respondent/original plaintiff, was barred by limitation. It is also urged by the learned senior counsel for the appellants that the learned lower appellate Court was in error in upsetting the finding of the trial Court, which had directed the execution of the Sale Deed against the payment of Rs. 23,169/- by holding that only an amount of Rs. 3,349/- remained to be paid from out of the total consideration.

8. In respect of the first point, which is urged before me, it would be seen that the Agreement is

dated 2nd April 1978. A notice had been issued by the plaintiff calling upon the defendants to perform their part of the Agreement and the said notice is dated 4th June 1980. The suit came to be filed on 21st November 1981. The assertion that he was ready and willing to perform his part of the contract by paying the balance is not denied by the defendants. The defendants in their written statement have also not set up a plea that, because of any delay on the part of the plaintiff, he was not entitled to a decree of specific performance of the contract. No issue in this regard was at all framed by the learned trial Court as there was no pleading. This point was also not specifically urged before the learned lower appellate Court. Such a point is primarily a mixed question of fact and law. Unless there is evidence before the Courts below, the Courts below cannot throw out the suit of the plaintiff by holding that there was any delay in seeking specific performance of the contract. According to me, therefore, the appellants are not entitled to urge this point for the first time in Second Appeal. Even otherwise, according to me, it is a question of fact and not a substantial question of law meriting consideration in Second Appeal.

9. In respect of the plea of limitation, it would be useful to make a reference to the written

statement of the defendants. The point of limitation was not raised before the learned trial Court nor was it specifically raised before the learned lower appellate Court. Be that as it may, the Agreement was executed on 2nd April 1978. The suit came to be filed on 2nd November 1981. There is a pleading that, on 15th October 1981, unwillingness to complete the sale was informed to the plaintiff. The pleading to this effect is in paragraph 9 of the plaint and which has not been denied by the defendants in their written statement in answer to paragraph 9. On perusal of the dates of the Agreement and the institution of the suit, it is apparent that the suit of the plaintiff was within limitation and, therefore, this submission of the appellants merits no consideration.

10. In respect of the third point which is urged, it is useful to make a reference to the findings of the learned trial Court where the trial Court in respect of issue no. 2 has held that the plaintiff has paid Rs. 36,831/- and Rs. 14,820/- to the deceased Reginaldo. This finding has been given on the basis of the documentary evidence tendered by the plaintiff. The learned lower appellate Court, therefore, came to the conclusion that the trial Court was not correct in directing the plaintiff to pay Rs. 23,169/- as the balance amount actually due and payable by the

plaintiff was Rs. 3,349/- as the plaintiff had proved that he had paid Rs. 36,831/- and Rs. 14,820/- to deceased Reginaldo. I do not see any error or any perversity in the reasoning of the learned lower appellate Court to hold that the appellate Court was in error in holding so.

11. This Second Appeal which assails the concurrent finding of facts recorded by the two Courts below, according to me, does not raise any substantial questions of law to warrant any interference in Second Appeal. There is no perversity in the reasoning of the two Courts below and I am of the considered opinion that the Second Appeal is devoid of any substance and deserves to be dismissed in limine.

12. The Second Appeal is, accordingly, dismissed in limine with no order as to costs.

(P.V. HARDAS)
JUDGE.

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